

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1264

To be argued by
PETER M. BLOCH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1264

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY NAPOLI,

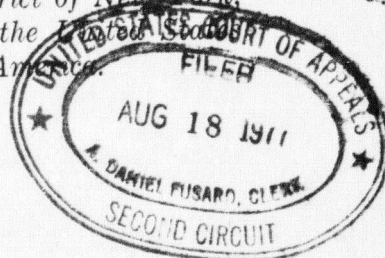
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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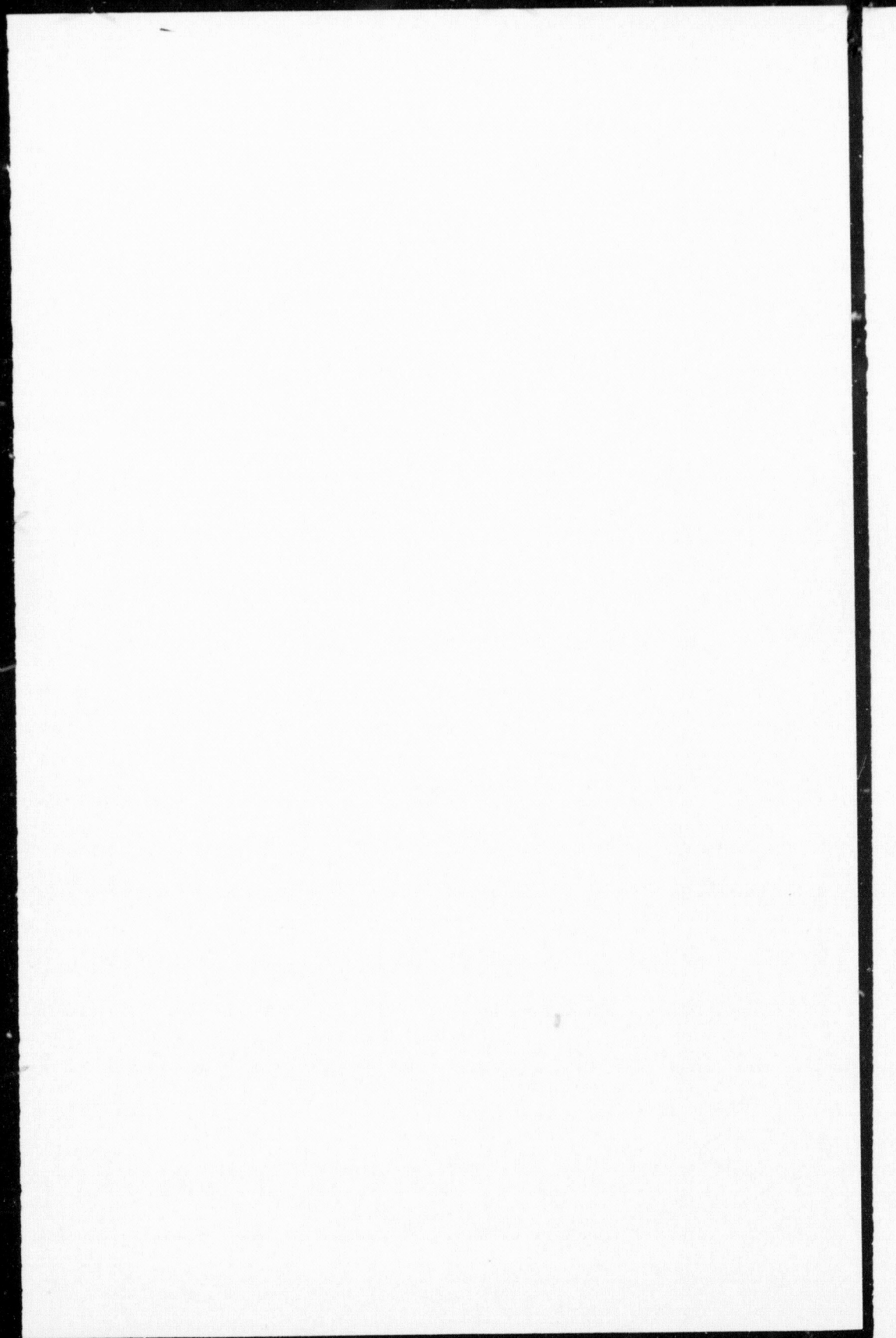


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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1264

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY NAPOLI,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Anthony Napoli appeals from a judgment of conviction entered on May 24, 1977, in the United States District Court for the Southern District of New York, after a two-day trial before the Honorable Lloyd F. MacMahon, United States District Judge, and a jury.

Indictment 77 Cr. 167 charged Napoli in Counts One through Twenty with making false claims to the Department of Health, Education and Welfare in violation of Title 18, United States Codes Section 287, with respect to overbilling the Medicaid program for 20 patients he treated during 1972; in Counts Twenty-One through Forty with making false statements to the Department of Health, Education and Welfare and using false documents with respect to the invoices submitted for the same 20 patients in violation of Title 18, United States Code, Section 1001; and in Count Forty-One with mak-

ing a false material declaration before a Grand Jury in violation of Title 18, United States Code, Section 1623.

The trial commenced on May 2, 1977. On May 3, 1977, the jury found Napoli guilty as charged on all 16 counts submitted to it.* On May 24, 1977, Judge MacMahon sentenced Napoli to two years imprisonment and a \$10,000 fine on each of the fifteen false statement counts on which he was convicted, to run concurrently with each other. On Count 41, Judge MacMahon imposed a 2 year prison sentence and a \$10,000 fine but suspended the execution of the prison sentence and placed the defendant on probation for two years to run consecutively to the sentence imposed on the false statement counts. Napoli remains free on his own recognizance pending this appeal.

Statement of Facts

The Government's Case

The Government's case overwhelmingly demonstrated that Napoli, a licensed chiropractor practicing at the Lee Avenue and Galler Medical clinics (GX 21), repeatedly billed Medicaid during 1972 for seeing patients for between eight and twelve visits at Lee Avenue when, in fact,

* At the suggestion of the Court, the Government elected to proceed exclusively on the false statement and perjury counts. (A. 262a). Accordingly, Counts One through Twenty were dismissed with the consent of the Government (A. 398a). Also, prior to trial the Government indicated it would not proceed with respect to five of the invoices charged in the indictment. (A. 65a). Thus, counts 24, 29, 31, 37, and 40 were dismissed with the consent of the Government. (A. 398a). Accordingly, fifteen counts of making false statements as well as the perjury count were submitted to the jury. Citations to "A" refer to the appellant's appendix; "Br." refers to the appellant's brief; "GX" refers to a Government exhibit at trial; "E" refers to the appellant's exhibit volume.

he had treated those patients at most only once, twice or three times. It was stipulated at trial that on January 16, 1975, Napoli under oath before the December 1974 additional grand jury which was sitting in the Southern District of New York and investigating violations relating to the Medicaid program, was asked the following question and gave the following answer material to the Grand Jury investigation:

Q. Dr. Napoli did you ever submit a fictitious invoice in the sense that you either billed for a patient you had not seen or billed in excess of the number of visits you actually administered?

"A. No, I have not" (A. 258a).

All the patients named in the Indictment were eligible for federally reimbursed Medicaid funds and, based on the certification by Napoli on the Medicaid Invoice for Doctor's Services that he performed chiropractic services for these patients between eight and twelve times, the United States Department of Health, Education and Welfare ("HEW") paid fifty per cent of the total billings claimed by Napoli (GX 21).*

The evidence showed that Medicaid was billed by Napoli for treating Rosaline Ero for migraine headaches on nine occasions between March 8, 1972 and April 10, 1972. (GX 1). Ero testified she saw two different chiropractors. At the most she saw one of them two times and the other three times. She received massages of her back and neck. (A. 233a-237a). Ero did not have back trouble

* HEW under the Medicaid program pays 50% of the cost of medical services to families with dependent children and to aged, blind, or permanently disabled individuals whose income and resources are insufficient to meet the cost of necessary medical services. (GX21).

and never suffered from migraine headaches (A. 235a, 239a).*

Similarly in March 1972, Napoli billed Medicaid for eight visits by Nydia Barrentes for migraine headaches. (GX 2). Barrentes remembered being treated two times by a chiropractor at the Lee Avenue clinic in 1972. She testified that in her whole life she could not have gone to a chiropractor more than three times. At the time she visited the chiropractor she had no problems with her back or with headaches. (A. 141a-44a, 151a).

Barbara ~~Tolliver~~ was sent to Dr. Napoli by a receptionist at Lee Avenue during February or March 1972 while she was receiving allergy shot treatments at the clinic. She received x-rays on her first visit to Dr. Napoli and a back massage on the second. She never returned again to Dr. Napoli because she did not feel comfortable with the way the massage was done. In her entire life those two visits were the only times she ever saw a chiropractor (A. 163a-66a). Napoli billed Medicaid for twelve visits for arthritis (GX 3) although Tolliver never was treated for arthritis of any kind by any doctor. (A. 173a).

Sara Diaz was sent to a chiropractor at Lee Avenue whom she had no intention of seeing. The chiropractor massaged her back telling her one side of her body was larger than the other. She returned for a second visit during which she was told to have x-rays taken. However,

* Napoli's allegedly incompetent trial counsel (see Napoli's Point IV) managed to keep from the jury's consideration one of the most damaging pieces of evidence against Napoli which concerned the treatment of Ero. (A. 68a-72a, 239a-241a, 244a-248a). Government's exhibit 1A for identification, which was repeatedly offered, showed that Medicaid was billed by another chiropractor at Lee Avenue, Dr. Jacobson, for visits between March 24 and April 28, 1972. In particular four visits billed by Jacobson were also billed by Napoli for treatment on the very same day.

she never went for the x-rays or received further treatments because she felt they were unnecessary. Those two visits were the only times she ever visited a chiropractor in her life. (A. 154a-157a). Dr. Napoli billed Medicaid for eleven visits by Diaz. (GX 5).

Dorothy Lee, who was being treated for heart trouble, was referred to a chiropractor at Lee Avenue by the clinic's receptionist. She was told her body was lop-sided and received treatment on this first and only visit by her ever to a chiropractor. She never got further treatment because she reasoned if her body was lop-sided the chiropractor could do nothing to improve the condition. (A. 216a-19a). Dr. Napoli billed Medicaid for ten visits by Mrs. Lee. (GX 6).

Louise Cherry visited a chiropractor three times in her entire life, all at Lee Avenue in June 1972 after an operation she had on June 6. She did not visit the chiropractor in May or July, 1972. She did not return because her back pain for which she was being treated went away and because she did not feel the chiropractor was working long enough on her back. (A. 87a-89a, 99a-100a). Napoli billed Medicaid for ten visits by Cherry covering the period May 31, 1972 to July 3, 1972. (GX 7).

Napoli claimed to have treated Bertha Cunningham on ten visits in 1972. (GX 8). She saw a chiropractor at Lee Avenue only three times. She was sure she did not see the chiropractor ten times and had stopped going after three visits because the clinic was located too far from her residence. (A. 224a-26a).

Lynette Brown's invoice showed a total of ten visits to Dr. Napoli during 1972 including one on June 5, 1972 and seven visits thereafter (GX 10). However, between June 4 and June 9, 1972, Mrs. Brown was in the hospital for an abortion and tubal ligation. Her operation was performed on June 5, 1972. (GX 10A). Mrs. Brown

only received chiropractic treatment once in her life and that was before she was hospitalized. She never returned to the chiropractor after her one visit because of her pregnancy and because her back hurt more after she went than before. (A. 203a-07a).

Lillie Smith went to Lee Avenue to see a gynecologist. She did not intend to see the chiropractor when she went but was told to see the chiropractor by the receptionist. She made a total of two visits and did not return thereafter because she felt she had no need to go to a chiropractor. She never saw a chiropractor any other time in her life. (A. 104a-108a). Smith's invoice shows Napoli claimed to have treated her ten times. (GX 12).

Like Lillie Smith, Angelica Gonzalez was sent to a chiropractor at Lee Avenue by the receptionist. On her one and only visit to a chiropractor, she did not recall mentioning anything about headaches although she did receive a massage. She never returned as the doctor asked because she did not like him. (A. 122a-25a). Dr. Napoli claimed to have seen her ten times to treat migraine headaches. (GX 13).

Ramona Allende-Soler saw a chiropractor three times at a clinic having nothing to do with Dr. Napoli. She saw a chiropractor in Brooklyn one other time; this was during 1972. Her purpose in going to the second clinic was to see a gynecologist. She never returned to the chiropractor at this clinic because she did not believe chiropractors helped her and because she felt she had spent too long waiting for treatment. (A. 175a-78a). Dr. Napoli billed Medicaid as if he had treated her ten times. (GX 14).

Regina Smith saw a chiropractor once in her life. This occurred at Lee Avenue. During this one visit, she received a back massage. She was not pregnant at the

time was treated. Dr. Napoli billed her for nine visits for head pain during the summer of 1972 when Miss Smith was, in fact, pregnant. (A. 131a-35a, GX 15).

Eneida Rivera visited Dr. Napoli at Lee Avenue only once. This occurred in 1972. The only other time she saw a chiropractor in her life was when she saw a second chiropractor at Lee Avenue for one visit. When she saw Dr. Napoli she had come to see the eye doctor and was told to see the chiropractor. Although she had made no complaints of anything being wrong, she was told by Dr. Napoli that there was something wrong with her spine. (A. 250a-54a). Napoli billed Medicaid for 10 visits claiming treatment of Mrs. Rivera during the summer of 1972, each time for migraine headaches. (GX 16).*

Jennie Gonzalez was billed for ten visits by Dr. Napoli between August and September 1972. (GX 18). Gon-

* All of the patients testified they never loaned their Medicaid cards to anyone else and all testified they never lost their Medicaid cards or if they did lose them it was at a time that did not coincide with the dates Dr. Napoli billed them for. The suggestion in Napoli's brief (Br. at 11) that Mrs. Rivera had lost her card at the time she saw Dr. Napoli ("during the hot months of 1972") is completely misleading in that the witness immediately corrected her testimony to say she lost her card at the end of 1972. (A. 251a). Even if the exact time when she lost the card is unclear, the jury could well infer that the extra visits to Lee Avenue claimed by Dr. Napoli were not caused by the unlikely coincidence of another woman finding the lost Medicaid card and using it for the same chiropractor at the same clinic. Rather, the jury could infer from the pattern of conduct that Dr. Napoli, just as he did in the case of every other patient witness had engaged in his systematic practice of seeing a patient once or twice and then billing for ten visits. That Mrs. Rivera and not someone else was using her Medicaid card in the summer of 1972 is indicated by the patient records of Lee Avenue which describe Mrs. Rivera in some detail and show she was using her Medicaid card while being treated by other doctors at Lee Avenue during this time period. (Def. Ex. K).

zalez testified she only saw a chiropractor at Lee Avenue on two occasions and did not visit ten times in a one month period as shown on Dr. Napoli's invoice (A. 183a-186a).

Margaret Jackson visited a chiropractor at Lee Avenue on two occasions for back trouble. On the second visit, her last ever to a chiropractor, she was taken to a mirror and told her spine was crooked. She never returned to the chiropractor because she believed that the doctor was holding her head in such a way as to make her spine look crooked when in fact it was not. (A. 194a-97a). Dr. Napoli billed Medicaid for treating her eleven times for migraine headaches. (GX 19).

Rena Morey, the HEW employee who investigated the case, testified that she spoke with approximately 45 patients, including those in the indictment, concerning billings from late December 1971 to early fall 1972. She testified that she did not interview any additional witnesses because she felt she had contacted an adequate number and also for the reason that her employment in the United States Attorney's Office was terminating. (A. 258a-60a).

Defendant's Case

Napoli testified on his own behalf and claimed that he never intentionally overbilled Medicaid for any patients he had ever seen. (A. 271a, 273a-74a). He claimed to have maintained contemporaneous records of each visit made by each patient, including the 1500 to 2000 he saw in 1972, but admitted to having no records of the patients named in the indictment. (A. 265a, 270a, 275a). He claimed to have answered all questions voluntarily and truthfully in his grand jury appearance. At no time did he testify that he understood the question that he was ultimately found to have answered perjurally to have

application only to Galler clinic billings or to have any other meaning other than appears evident on the face of the question. (A. 269a-70a, 274a-75a). On direct examination, in an obvious effort to show that the defendant had not made a great deal of money from his Medicaid practice, testimony was elicited showing that Napoli had a gross income of only \$22,000 for the year 1972. (A. 273a). In cross-examination it was demonstrated he understated his gross income for 1972 both in his direct testimony and on his tax return by about \$9,000. (A. 279a-83a). Napoli claimed to have worked at the Lee Avenue clinic the same three days each each week. (A. 277a-79a). He also claimed to have commenced work at the Lee Avenue Clinic in 1972 (A. 264a-65a, 275a-76a) but was shown to have billed repeatedly for work allegedly performed at Lee Avenue as early as April 1971. (GX 25; A. 278a).

The Government's Rebuttal Case

The Court took judicial notice of a 1972 calendar (GX 28) which showed that while Napoli claimed to have worked at Lee Avenue three days a week he billed Medicaid for four days a week.*

* Napoli in his statement of facts on this appeal repeatedly goes outside the evidence presented at trial by referring to matter appearing only in Napoli's grand jury testimony which was never marked for identification at trial much less received in evidence. (E. 38-77). In particular, he uses that testimony to claim that Napoli's billing for a fourth day could be explained by his billing for patients of his who were treated by another doctor as a courtesy. Had that evidence been presented at trial, the Government would have been able to demonstrate that Napoli consistently billed Medicaid for four days a week and that these billings for four days did not stem from courtesy treatments. It should be noted that the grand jury testimony refers only to courtesy treatments done by a Doctor Gerber at a different clinic, and therefore does not provide any explanation for the Lee

[Footnote continued on following page]

ARGUMENT

POINT I

The Evidence Was More Than Sufficient On All Counts.

● Napoli half-heartedly contends that the evidence was insufficient to convict him on each count. (Br. p. 12, 56). Even a cursory reading of the statement of facts, however, demonstrates that as to each of the fifteen false statement counts, the evidence showed overwhelmingly that for each patient to which they related, Napoli made claims to the Department of Health, Education and Welfare on his invoice for doctors' services (GX 21) for between eight and twelve visits, when in fact, he had seen the patient a maximum of three visits. On one occasion, he even billed for a patient who was undergoing an operation in a hospital on a date he claimed to have treated her. (GX 10, 10a).

That these false overbillings were intentionally false is evident from the fact that even a small survey of

Avenue fourth day billings. This is just one example of how Napoli's belated offer of the grand jury transcript, the accuracy of which he himself disputes, made only after all the evidence had been taken, summations had been given and the court's charge had been completed, would have led to confusion and misleading of the trial jury. See Point III; *infra*. Even in the record, Napoli's explanation for billing on four days is contradicted since, for example, he billed patients on four different days of the week who in their entire lives only were treated by one chiropractor and thus could not have been treated by a second doctor as a courtesy. (E.g. GX 3; A. 165a). Further, defendant's continued reference to the grand jury transcript, even were it in evidence, for his statement of facts is entirely out of place since, having found that the defendant was testifying perjuriously, the jury was entitled to entirely disregard such evidence. 2 Wigmore on Evidence § 1010 (3d ed. 1970); Devitt & Blackmar, Federal Jury Practice and Instructions § 17.08 (3d. ed. 1977).

Napoli's patients turned up a repeated pattern of over-billing that included not only billing for excess visits, but billing for an extra day of the week in which Napoli did not even work in the clinic. (A. 258a-60a, A. 277a, 279a; GX 28, GX 1, GX 2, GX 3, GX 10, GX 12, GX 13, GX 16). The lack of inadvertence was emphasized by Napoli's frequently billing a patient for a treatment for a condition about which he did not complain or about which the patient was never informed. Further evidence from which the overwhelming inference flowed that the false statements were knowing is that the jury found Napoli to have given false exculpatory testimony both in the grand jury and at trial. *United States v. Mariani*, 539 F.2d 915, 920 (2d Cir. 1976); *United States v. Singleton*, 532 F.2d 199 (2d Cir. 1976); *United States v. Pui Kan Lam*, 483 F.2d 1202, 1208 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *United States v. Arcuri*, 405 F.2d 691, 695 (2d Cir. 1968), *cert. denied*, 395 U.S. 913 (1969). Also pointing to guilt is Napoli's total inability to produce any patient records documenting his claims of treatment.

The evidence showing that Napoli knowingly over-billed Medicaid invoices on systematic basis at the same time demonstrated that Napoli committed perjury when he told the grand jury, "No, I had not" in response to the question "Dr. Napoli, did you ever submit a fictitious invoice in the sense that you either billed for a patient you had not seen or billed in excess of the number of visits you actually administered?" Further, the jury could conclude that Napoli's false answer in the grand jury and his overstating the amount to which he was entitled on Medicaid vouchers was intentional and knowing and not inadvertent when, under penalties of perjury, Napoli also falsely understated the gross income from his practice on his 1972 tax return by some \$9,000.00. (GX 26, 27; A. 273a, 279a-83a).

Napoli does not dispute that this proof is contained in the record, or even that such proof is a sufficient

showing to support a conviction.* Rather, Napoli invites this Court, as he invited the jury below, to disbelieve the Government's evidence because the Government witnesses were testifying as to events four-and-a-half to five-years old and because some of the witnesses displayed what Napoli considers to be faulty memory as to the name, number of visits made, or the type of treatment they or their family received from physicians other than Dr. Napoli by whom they were treated. (Br. at 10-12). As this Court has noted, "The simple answer is that this argument was rejected by the jury, and the verdict was amply supported by the record." *United States v. Cavaliaro*, 553 F.2d 300, 303 (2d Cir. 1977). It was for the jury rather than this court sitting as a "super jury" to decide such questions of credibility as whether or not visiting a chiropractor who massaged backs, stretched people's legs to their necks, told patients their spines were crooked while twisting their heads or visiting a chiropractor they did not intend to see in the first place was a sufficiently unusual event in the lives of the Government witnesses that they would remember them with clarity several years after. *United States v. Birnbaum*, 373 F.2d 250, 257 (2d Cir.), cert. denied, 389 U.S. 837 (1967); *United States v. Hawley*, 554 F.2d 50, 52 (2d Cir. 1977); *United States v. Taylor*, Dkt. No. 76-1210, slip op. 2805, 2815 (2d Cir. April 13, 1977); *United States v. Marchisio*, 344 F.2d 653, 662-64 (2d Cir. 1965). Since the jury decisively credited the Government's witnesses and rejected Napoli's testimony, the defendant must take the proof in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Hawley*, supra, 554 F.2d at 52, *United States v. Falcone*, 544 F.2d 607, 610, (2d

* The test for sufficiency is "whether upon the evidence taken as a whole, a reasonable mind right fairly conclude that the defendant was guilty beyond a reasonable doubt" *United States v. Wiley*, 519 F.2d 1348, 1349 (2d Cir. 1975), cert. denied, 423 U.S. 1058 (1976).

Cir. 1976), *cert. denied*, 45 U.S.L.W. 3600 (March 7, 1977); *United States v. McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972). This proof, as set forth, *supra*, unquestionably was sufficient for conviction.* *United States v. Matanky*, 482 F.2d 1319 (9th Cir.), *cert. denied*, 414 U.S. 1039 (1973); *See United States v. Catena*, 500 F.2d 1319, 1324-25 (3d Cir.), *cert. denied*, 419 U.S. 1047 (1974); *United States v. Katz*, 455 F.2d 496 (5th Cir.), *cert. denied*, 408 U.S. 923 (1972).

POINT II

There Was No Prosecutorial Misconduct Or Evidence Improperly Received.

Napoli, using more hindsight and imagination than substance, claims the record to be "replete" with the admission of improper evidence and instances of misconduct requiring reversal. (Br. at 15). Since all the disputed evidence was properly admitted and there was no prosecutorial misconduct, this claim is without merit. Further, Napoli interposed no objection to nearly every claimed

* The only count in which Napoli even colorably mounts an attack on the sufficiency of the evidence is Count 36, in which the proof shows that Eneida Rivera lost her Medicaid card sometime during 1972. For the reasons explained in the footnote on p. 7 *supra*, Napoli's view of the evidence with respect to this count and the inferences to be drawn therefrom are entirely erroneous. Nevertheless, the court need not reach this spurious claim because even if this court were to agree with Napoli, there remain fourteen other counts where the evidence is unassailably sufficient, where no claim of collateral consequences from the inclusion of count 36 has been made and on which the defendant received concurrent sentences to Count 36. *United States v. Mejias*, 552 F.2d 435, 444-45 (2d Cir. 1977); *United States v. Hanlon*, 548 F.2d 1096, 1099 (2d Cir. 1977); *United States v. Vasquez*, 468 F.2d 565 (2d Cir. 1972) *cert. denied*, 410 U.S. 945 (1973); *United States v. Gaines*, 460 F.2d 176 (2d Cir.) *cert. denied*, 409 U.S. 883 (1972); *See Andresen v. Maryland*, 427 U.S. 463, 469 n.4 (1976).

instance of prejudice at trial. In those instances he is precluded from raising the issue on appeal.

A. The Admission of Napoli's False 1972 Tax Return Was Proper

Napoli testified on his direct examination, in an attempt to demonstrate how little money he earned from his practice, that in 1972 he earned \$22,000 gross income as a chiropractor. (A. 273a). On cross-examination, it was demonstrated that Napoli claimed \$22,000 gross income from his practice on his tax return as he had testified but that the true figure he should have reported from sources of which he was fully aware was \$31,000. (A. 279a-83a). Napoli attempted to explain the discrepancy as being attributable to the fact that he had incurred factoring expenses in connection with his billings and that discrepancies between his tax return and his Medicaid billings as reflected by the New York City Department of Social Services were due to the fact that the monies paid out by the Department of Social Services had not yet accrued to him. (A. 283a-84a). Napoli all but admits this explanation, proffered both to the jury and this Court, "helped more than it hurt the prosecution's cross-examination." (Br. at 45). On re-cross examination, the prosecutor elicited that Napoli, rather than omitting factoring costs from gross income on his 1972 income tax return as he had claimed, had in fact included them and deducted \$9,027 in factoring expenses, and further that he was using a cash rather than an accrual basis of accounting. (GX 27; A. 284a-85a). Under these circumstances, Napoli's present claim that the use of the income tax return was improper is entirely frivolous, for at least three independent reasons.

First, of course, Napoli made no objection at trial to the entire course of the testimony. Accordingly, he has not preserved the issue for appellate scrutiny in any event. *United States v. DiNapoli*, Dkt. No. 77-1052, slip op. 4281, 4285 (2d Cir., June 20, 1977); *United States*

v. *Medico*, Dkt. No. 76-1426, slip op. 3795, 3809 (2d Cir., May 25, 1977); *United States v. Di Stefano*, Dkt. No. 76-1581, slip op. 3539, 3547-48 & n. 5 (2d Cir., May 16, 1977); *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3790 (June 6, 1977), and cases there cited.*

Moreover, even had an objection been made, this evidence was properly admissible in any event. Napoli concedes—as he must—that evidence of a defendant's wilful understatement of \$9,000 would be admissible for impeachment purposes “to contradict a specific fact testified to by the defendant” for the purpose of showing he testified falsely on that point. (Br. at 16-17). *United States v. Nathan*, 476 F.2d 456, 460 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973); *United States v. Cuadrado*, 413 F.2d 633, 635 (2d Cir. 1969), *cert. denied*, 397 U.S. 980 (1970); *United States v. Keilly*, 445 F.2d 1285, 1288-9 (2d Cir. 1971), *cert. denied*, 406 U.S. 962 (1972); see *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971). Napoli ignores the fact that the subject of his \$22,000 gross income was, in fact, raised in his own direct examination and thus, even under his own analysis, the evidence of the falsity of this testimony was admissible.

* The lack of an objection or a request for a limiting instruction also disposes of Napoli's additional claim that the trial court should have instructed the jury on the limited nature of the proof. *United States v. Lubrano*, 529 F.2d 633, 637 (2d Cir. 1975), *cert. denied*, 429 U.S. 818 (1976); see *United States v. Bermudez*, 526 F.2d 89, 96-97 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976); *United States v. Papadakis*, 510 F.2d 287, 295, *cert. denied*, 421 U.S. 950 (1975). *United States v. Bozza*, 365 F.2d 206, 214 (2d Cir. 1966). In *Estelle v. Williams*, 425 U.S. 505, 508 n.3 (1976), after noting with approval this Court's decision in *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966), the Supreme Court noted “the reason for this rule [that errors not objected to in the trial court will not be considered on appeal] is clear: if the defendant has an objection, there is an obligation to call the matter to the court's attention so the trial judge will have an opportunity to remedy the situation.”

In addition, under F.R. Evid., Rules 404(b) and 403 proof of other crimes is admissible for any purpose other than showing criminal character as long as the probative value is not "substantially outweighed" by the danger of unfair prejudice. *United States v. Rosenwasser*, 550 F.2d 806, 808 (2d Cir. 1976); *United States v. Viruet*, 539 F.2d 295 (2d Cir. 1976); *United States v. Papadakis, supra*, 510 F.2d at 294 (1975). In the present case, the only ultimate fact seriously in issue was Napoli's contention that he never knowingly or intentionally falsified Medicaid invoices in order to earn more income from the Medicaid program, and that to the extent there were any misstatements on the invoices they were inadvertent. Proof that he intentionally understated his income, particularly with respect to Medicaid income, was thus highly relevant to demonstrate that his claims on the Medicaid invoices were intentionally false and not just the result of accident or inadvertence, and also to show that the false testimony given in the grand jury by Napoli was intentional and not inadvertent. *United States v. Kaufman*, 453 F.2d 306, 310 (2d Cir. 1971) (prosecution for false statements in an affidavit; proof of unrelated false statements in a tax return admissible); *United States v. Sweig*, 441 F.2d 114, 119 (2d Cir.), *cert. denied*, 403 U.S. 932 (1971) (perjury prosecution with defense of mistake; evidence of prior sworn false testimony proper "beyond doubt.") *United States v. Williams*, 470 F.2d 915 (2d Cir. 1972); *United States v. Freedman*, 445 F.2d 1220, 1224 (2d Cir. 1971). See *United States v. Leonard*, 524 F.2d 1076 (2d Cir. 1975), *cert. denied*, 425 U.S. 958 (1976).*

* Had the issue of admitting the tax returns been raised in the trial court before being introduced, the defendant could only have contested admission if the trial court had acted "arbitrarily and irrationally" in finding the probative value outweighed its prejudice. *United States v. Robinson*, Dkt. No. 76-1153, slip op. 5021, 5034 (2d Cir., July 28, 1977) (*en banc*). Under the decided cases the admission was not only not irrational but clearly warranted.

Contrary to Napoli's misreading of the Government's summations, the jury was never told it could convict the defendant because he was a bad character.* On the contrary, the Government stated that there was no reason to doubt that Napoli was a respected person in his community.** (A. 318-19a). The use of the tax return was mentioned only briefly in each summation (A. 321a, A. 350a). Each time it was used in connection with defendant's mental state in making the false statements on Medicaid invoices, i.e., his intention and willingness to make false statements involving his Medicaid earnings and billings to benefit monetarily from the Government and the absence of mistake on his part in claiming for visits that did not occur.***

* Defense counsel also made it very clear to the jury Napoli was not to be convicted on this indictment even if the jury found he evaded his taxes. (A. 342a, 343a).

** Defendant also complains in passing of the inquiry without objection into the false statements on Napoli's tax return in the Government's cross-examination of three of defendant's character witnesses. Such questioning was unquestionably proper as cross-examination into specific instances of misconduct relating to defendant's character for truthfulness not posing the ultimate question of defendant's guilt or innocence. *United States v. Morgan*, 554 F.2d 31 (2d Cir. 1977) is specifically contemplated by F. R. Evid., Rule 608(b) and the decided cases. *Michelson v. United States*, 335 U.S. 469 (1948); *United States v. Wolfson*, 405 F.2d 779, 785-86 (2d Cir. 1968), *cert. denied*, 394 U.S. 946 (1969). Defendant moreover, conveniently ignores the fact that the subject of Napoli's taxes was first broached on his direct examination in the case of two of the three character witnesses. (A. 297a-98a, 300a).

*** In addition, of course, Napoli never objected to these or any other statements in the Government's summation, thus precluding that issue for appellate review. *United States v. Head*, 546 F.2d 6, 7-8 (2d Cir. 1976), *cert. denied sub nom. Wheaton v. United States*, 45 U.S.L.W. 3634 (March 21, 1977); *United States v. Ong*, 541 F.2d 331, 342-3 (2d Cir. 1976) *cert. denied*, 45 U.S.L.W. 3509 (Jan. 25, 1977); *United States v. Canniff*, 521 F.2d 565, 572 (2d Cir. 1975, *cert. denied sub nom. Benigno v. United States*, 423 U.S. 1059 (1976). Obviously an objection below would have provided an opportunity to correct any ambiguity in the Government summation as to the use for which the jury could properly make of the false tax return testimony assuming there was ambiguity.

B. The Rena Morey Testimony Was Admissible

Rena Morey, the HEW employee conducting the Napoli investigation, testified that during her entire investigation she contacted a total of approximately 45 people, including the people named in the indictment, concerning Medicaid billings by Dr. Napoli spanning the period of late 1971 to the fall of 1972. She testified that she did not interview additional people as she felt she had an adequate number of witnesses and because her appointment as an investigator was coming to an end. There was absolutely no reference by Mrs. Morey to the content of any of the 45 interviews. (A. 258a-60a).

Napoli argues that this testimony was used by the Government to demonstrate that "500 [witnesses] would have marched into court and told a story similar to the story told by the 15 people actually called." Br. at 22. He also argues that the Morey testimony was inadmissible hearsay. While it would no doubt be reasonable for the jury to conclude that Napoli's 15 overbillings was indeed only a part of a continuous pattern of conduct, *United States v. Matanky, supra*, 482 F.2d at 1324, this reasonable inference from properly admitted evidence was never once argued to the jury by the Government, nor was it the basis on which the evidence was admitted. One can scour the record thoroughly without finding a single piece of evidence or argument as to what the testimony of any patient would be other than that of the 15 witnesses who actually took the stand.

The testimony of Mrs. Morey was unquestionably relevant to rebut Napoli's persistent arguments, both express and implied, that the false invoices were only isolated mistakes by the defendant and that the invoices represented the residue of what the Government could discover after combing 1,500 or 2,000 invoices and seizing on the

occasional witness who would testify to a version of events that she could not accurately remember but to which she adhered because she had locked herself into statements made without sufficient reflection or out of fear of being investigated for abuse of Medicaid (A. 80a-82a, 93a, 145a-46a, 265a, 273a, 324a, 327a-329a, 331a-333a). Indeed, a review of the record demonstrates that the creation of this false impression was the key-stone of Napoli's trial strategy. In his opening Napoli stated:

"They [the Government] are going to call approximately 15 witnesses, who are going to testify about events that happened four and five years ago, certainly four years ago . . . It sounds like a lot of people—15.

"But Dr. Napoli is going to take the stand in his own behalf in this case. *You are going to hear that the 15 people represent one-tenth of 1 percent of his practice.*

"So I urge you to look at the context in which this abstract number 15 comes. It does not represent 15 people out of 15. It represents 15 people out of 1500.

"What I would ask you to do is put aside the quantity of the evidence. The system under which we work goes to the quality of the evidence." (emphasis added) (A. 80a-82a).

Thus, from the very outset it was Napoli who suggested to the jury that they evaluate the sample from which the 15 people were drawn and to infer that the small percentage who testified represented only the poorest quality evidence from a 1500 person sample, and at most the 15 patients overbilled represented mistakes made by the defendant. The Government's evidence showed that the true sample involved in the case was 45 people and

that the quality of their testimony was high because a remarkably significant one out of three ratio of people interviewed verified being overbilled in precisely the same manner. As the trial court expressly found, the Morey testimony was entirely proper to rebut the misleading ratios propounded in defendant's opening statement (A. 260a). His decision that the probative value outweighed any possible prejudice was not "arbitrary" or "irrational". *United States v. Robinson, supra*, slip op. at 5036.

This is particularly apt when it remembered that the Government never elicited the total number of patients, treated by Dr. Napoli. Without defendant's testimony that he treated 2,000 patients the possible inference that more fraud had been committed, which was never suggested to the jury in any event, would never have surfaced. Moreover, by raising the specter of at least 1485 uncalled witnesses, the defendant himself was asking the jury to speculate what their testimony would be and to infer that their testimony would be unfavorable to the Government. Having before them testimony explaining the Government's reasons for failure to call more witnesses than it did, the jury could more accurately assess what inference, if any, to draw from the equally available uncalled witnesses. See *United States v. Erb*, 543 F.2d 438, 444 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3400 (Nov. 29, 1976); *United States v. Dixon*, 538 F.2d 1388, 1394 (2d Cir. 1976).

United States v. Brown, 548 F.2d 1194 (5th Cir. 1977), cited by Napoli is entirely inapposite. Even assuming this Court were to follow that Circuit's split decision, the facts are entirely different. There the trial court admitted testimony of a tax investigator that in addition to the counts in the indictment, the investigator had found 146 additional instances of overstated itemized

deductions. The Court considered this testimony to be incompetent because the testimony in effect summarized out of court statements to the investigator by 146 taxpayers who never were called to testify to the effect that they were not entitled to the deductions claimed on their tax return. The statements of these 146 witnesses were not subject to cross-examination. Because the testimony was inadmissible hearsay that necessarily relied upon information given in out-of-court conversations, it could not be admitted under Rule 404(b). The Court never intimated that there would be anything improper in demonstrating that the 12 counts that went to the jury were taken from a sample of 160 tax returns. That, of course, is all that occurred here. Indeed, such evidence is simply not hearsay, since Mrs. Morey's testimony is not "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. Rule 801(c). Indeed, there is absolutely no statement of what these 45 people said, much less a claim that the contents of what they said were true.* There was simply no testimony

*In fact, by relying on the one out of three ratio (15 out of 45) that defendant so vociferously complains of, in fact, the Government conceded to the defendant the most favorable of inferences, namely that the remaining 30 witnesses interviewed by Mrs. Morey would have testified favorably and not adversely to the defendant. Thus, defendant's suggestion that he was somehow prejudiced by an attempt to increase the one out of three ratio by the Government's questioning of Morey (Br. at 25) is sheer nonsense. The jury did not hear any evidence, and there was not the slightest suggestion made by the prosecutor, as to what the other 30 witnesses would say. Yet though there was no evidence one way or the other that Mrs. Morey found only 15 witnesses favorable to the Government, the Government steadfastly assumed at all times in its closing argument that the 30 witnesses did not support the Government and that only one out of three people contacted, ~~among~~ those who testified at trial, could testify to overbilling. Moreover even had the one isolated Government question suggested that more than 15 people told Mrs. Morey that they had visited Napoli more times than they were billed, the jury had already been instructed by the Court that counsels' questions are not evidence. (A. 147a).

admitted unlike in *Brown*, that defendant required anybody else than Mrs. Morey to cross-examine. The testimony was competent and the trial court properly exercised its discretion in weighing the probative value against its possibility of prejudice to Napoli especially in view of the defense first raising the issue. The trial court's admission of the evidence was certainly not an irrational or arbitrary abuse of discretion. *United States v. Robinson, supra*.

C. The Prosecutor Made no Attempt Whatsoever to Portray Napoli as a Conspirator in an Uncharged Medicaid Mill Scheme.

Napoli attempts to suggest that the Government improperly implicated him in a conspiracy involving "Medicaid mills" and a wide scheme involving "ping-ponging." * This claim is utterly unsupported in the record.

During the course of the trial the Government introduced evidence that patients were told by the receptionists or other doctors at Lee Avenue to see a chiropractor and that several witnesses were sent to the chiropractor when they did not intend to see one. This perfectly proper testimony was introduced without objection to demonstrate the reason why the Government witnesses did not return for ten or twelve visits as claimed by Dr. Napoli, and why they would remember that fact clearly several years later. Just prior to making this perfectly reasonable argument to the jury, the Government made the only mention in its entire summation of

* Indeed the only mention of the general problem of Medicaid fraud was in Napoli's summation in which he adverted to the widespread publicity concerning fraud in the Medicaid program and admonished the jury to disregard the Medicaid program in general and concentrate on Dr. Napoli as an individual. (A. 322a-323a).

the practice of ping-ponging. It stated flatly, contrary to what defendant would have this Court believe was suggested to the jury: "*This is not a case about ping-ponging* witnesses from one doctor to another." (A. 316a). Indeed, there was not even the slightest suggestion in summation that the defendant was in any way responsible for patients being referred to him by others.

In the Government's summation there is never a single mention of the term "Medicaid mills" or anything vaguely resembling an attack on the Lee Avenue medical operation. On the contrary, it was conceded that Dr. Napoli might be an able physician. (A. 318a). There is not even a single appeal to the jury in any way mentioning the extensive fraud occurring in the Medicaid program or ever asking them to remember the effect that Medicaid fraud, such as committed by Dr. Napoli, has on taxpayers and on the quality of treatment rendered to the poor and aged under the program. The Government summations taken as a whole were extremely low-keyed.

Napoli is unable to point to a single instance where even the slightest attempt to arouse the prejudice of the jury was made much less a "flagrant abuse" sufficient to warrant reversal. *United States v. Dibrizzi*, 393 F.2d 642, 646 (2d Cir. 1968); *United States v. Williams*, *supra*. Accordingly, it is no surprise that the Government's summations did not occasion a single objection. The failure to raise an objection waives any claim to impropriety, even if one validly existed. *United States v. Head*, *supra*, 546 F.2d at 8; *United States v. Ong*, *supra*, 541 F.2d at 342-3; *United States v. Canniff*, *supra*; *United States v. Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971).

D. The Remaining Instances of Alleged Misconduct In No Way Prejudiced Napoli And Were Waived In Any Event.

Napoli objects to the remarks in summation relating to character witnesses in which the Government stated it was "amazing" that a character witness would not change his opinion if he found that the defendant had understated his gross income by \$9,000 and ascribed the surprising answer to loyalty to the defendant. Napoli attempts to portray these remarks as prejudicial in that they represent the personal belief of the prosecutor that defendant's character witnesses should not be believed. While this part of the summation would have been better phrased as a conclusion which the jury could unquestionably draw from the evidence in the record, it is clear in context that there was no intention to have the jury reject Napoli's character witnesses on the prosecutor's personal belief. On the contrary, immediately preceding the aside in which Napoli now claims that the jury was told to reject his character witnesses, was the following statement:

"We are not saying here that Dr. Napoli wasn't an able physician. He might very well be an able physician. He may well be a respected figure in the Staten Island community. *No reason to doubt the word of those witnesses.* Although I am surprised to hear them say their opinion of the person's character wouldn't change if they cheated on \$9,000 worth of gross income."

(Emphasis added) (A. 318a-319a). Thus even were the remarks error, and even were they objected to in time so they could be properly rephrased, there is simply not a scintilla of possible prejudice that could have resulted much less sufficient prejudice amounting to plain error. *United States v. Morgan*, 554 F.2d 31, 33-34 (2d Cir. 1977).

In *United States v. Briggs*, 457 F.2d 908 (2d Cir.), cert. denied, 409 U.S. 986 (1972) where the prosecutor having committed several other improprieties commented on the credibility of witnesses, belief in whom was central to the case "I believe these agents, I have no doubts in my mind," the court refused to find plain error. The remarks about the defendant's character witnesses, in this case especially viewed in context, are inconsequential compared to those insufficient for reversal in *Briggs*.

Nor was there any error, much less plain error, in the absence of objection for the Government to argue that any chiropractic records the defendant might have maintained may have been altered to match the corresponding Medicaid invoices. Napoli testified in some detail as to his method of keeping his chiropractic records and implied that those records would match the invoices had he not misplaced them. (A. 268a, 270a-71a). It was a reasonable inference for the jury to conclude if they believed the Government witnesses and yet believed Napoli kept patient records, that even if those records had been produced and showed 8 or 12 visits per patient those records were no more *bona fide* than the invoices he wrote up which were unquestionably false. In any event, since the patient records were never produced, the whole issue is trivial and could not have had the slightest bearing on the outcome of the case.

In sum, Napoli's total inability to show anything but, at most, the most speculative kind of prejudice despite heroic attempts to blow every conceivable claim to gargantuan proportions serves only to illustrate how remarkably fair his trial was. See *United States v. Armedo-Sarmiento*, 545 F.2d 785, 793-94 (2d Cir. 1976), cert. denied, 45 U.S.L.W. 3601 (March 7, 1977).

POINT III

The District Court Acted Well Within Its Discretion In Refusing To Reopen Napoli's Case To Admit Unauthenticated Grand Jury Testimony After Summations And The Court's Charge Had Been Delivered.

Napoli argues that it was error for the trial court to refuse to admit into evidence the entire transcript of Dr. Napoli's testimony before the Grand Jury in which his perjured testimony was contained. In particular, he claims that this ruling deprived the jury and the trial court from considering the assertion that the question of whether Napoli ever submitted fraudulent invoices could have been understood by him to relate solely to Galler Clinic invoices and not to the Lee Avenue invoices adduced at trial. Since 1) the offer was made after all the evidence had been taken, and the Court's charge delivered; 2) Napoli himself disputed the accuracy of the transcript and laid no foundation for the admissibility of an accurate transcript; 3) Napoli never for an instant proffered this newly found "Galler only" theory at trial but relied on a totally contradictory strategy, and 4) the Government would have been unable to rebut this theory with evidence or even argument to refute it as well as other misleading material in the transcript, this argument is utterly without merit.

It is well settled that it is within the trial court's discretion to decide whether to permit a party to reopen its case even before summations have begun, and that decision will not be reviewed absent a clear abuse of discretion. *United States v. Bayer*, 331 U.S. 532 (1947); *United States v. Aiken*, 373 F.2d 294 (2d Cir. 1967), *cert. denied*, 389 U.S. 833 (1967); *United States v. Kenner*, 354 F.2d 780 (2d Cir. 1965), *cert. denied*, 383 U.S. 958 (1966); *United States v. Sheba Bracelets*, 248 F.2d 134 (2d Cir.), *cert. denied*, 355 U.S. 904 (1957); *Wol-*

cher v. United States, 218 F.2d 505 (9th Cir. 1954), *cert. denied*, 350 U.S. 822 (1955).

There is, of course, no requirement that all grand jury testimony *per se* be admitted in evidence in a perjury case arising out of grand jury testimony. *United States v. Rosenblum*, 339 F.2d 473 (2d Cir. 1974). It is only required to prevent confusion of the jury. The trial court was simply not shown any way possible confusion could have arisen by the question and answer stipulated to.

In the context of the trial, Judge MacMahon's decision to refuse permission to reopen the evidence was not an abuse of discretion but the only sensible result. In the first place, the transcript was not admissible into evidence even at a more appropriate point in trial because an adequate foundation had not been laid for its admissibility. Other than the stipulated portion of the Grand Jury transcript relating to the question and answer for which defendant was indicted, counsel for Napoli objected to using the proffered version of the Grand Jury transcript because his client believed it to be inaccurate. (Stipulation of counsel dated June 30, 1977) (A. 378a).^{*} Thus the Government had a right, after it had refrained from making any specific reference to the transcript at trial, to require the defendant to properly authenticate it. F. R. Evid. 901 and 902. This Napoli was unprepared to do.

Moreover, the timing and the nature of the offer in the context of the trial clearly warranted the trial court's ruling. After both sides had finished presenting evidence,

^{*} It was because the accuracy of the transcript was in doubt that the government and defense counsel did not offer any portion of the grand jury transcript but instead agreed to the simple stipulation that the one question and answer set forth in the perjury count of the Indictment was an accurate statement of what transpired in the grand jury with respect to that testimony and that the question was material to a Medicaid Fraud investigation being conducted by the grand jury. (A. 258a).

after both sides had summed up, and after the Court charged the jury, Napoli, with no explanation for the failure to offer the transcript earlier, offered the unauthenticated transcript for the vague reason that the grand jury evidence needed to be seen in "context". There was not the slightest mention that the context referred to at that time was the interpretation of the grand jury question disingenuously argued on this appeal for the first time, namely, that the question of whether Napoli ever submitted a fictitious invoice was misunderstood by Napoli to refer only to Galler clinic invoices and not the Lee Avenue invoices proved at trial. Rather, the record shows counsel was concerned that the jury understand the question asked of Napoli in the Grand Jury to mean "Did you ever *knowingly and willingly* submit fictitious invoices?" (emphasis added) as opposed to "Did you ever submit false invoices?", knowingly or not. The trial judge found that there was no question as to context in the light of the case and there was nothing at all to alert the judge that anything vaguely resembling the revisionist "Galler only" theory now proffered to this Court was intended.* (A. 378a).

Even assuming *arguendo* that Napoli intended to have the jury consider the theory that the question of whether

* Indeed subsequent events at the trial make it clear that defendant's new found theory was not intended. In response to a note from the jury, Judge MacMahon reread the Grand Jury testimony relating to the perjury count and went on to say that Napoli could be convicted of the count "if he knowingly submitted a single false invoice knowing it contained false, fraudulent fictitious statements." The Court thereby took care of counsel's "context" problem by requiring the jury to find that the submission of invoices to be knowingly false as counsel requested. If counsel had in mind that even if the jury believed Napoli knowingly submitted false invoices at Lee Avenue they could acquit because he was asked only if he submitted false invoices at Galler, counsel would have objected to the Court's answer to the jury's question and renewed his request to admit the entire grand jury transcript. (A-380a-81a). He did not do so.

he ever submitted a fictitious invoice related* to Galler Clinic only, allowing the jury to consider this new found theory when the case was about to be submitted to them would have been extremely unfair to the Government. Defendant had tried the entire case on the theory that he had answered all questions in the grand jury truthfully because he had never at any time submitted false invoices. He entered into stipulation that clearly indicated he believed the isolated question was all that was relevant to the perjury count. (A. 65a-67a). Further, Napoli testified twice at trial that he had truthfully answered all questions in the Grand Jury and even had read them over without ever once intimating in any manner that he understood the question of whether he ever submitted fictitious invoices to refer to Galler Clinic invoices only, rather than to the more obvious interpretation of invoices of any clinic.** Indeed, Napoli's failure to refer to a misunderstanding was alone a sufficient basis for refusing to reopen the case. See *United States v. Edwards*,

* In fact defendant was twice asked by his counsel in terms very similar to the grand jury question in Count 41 whether he ever or at any time intentionally billed for a treatment he had not performed. (A. 271a, A. 273a-274a). There is no claim that when defense counsel asked these questions there was any doubt "ever" or "at any time" were intended to be anything but all inclusive.

** Defense counsel acknowledged in his summation that he considered the question "did you ever submit any fictitious vouchers?" to be "a catchall phrase." (A. 339a). Then having conceded this, counsel stated "I say if you don't find him guilty on the perjury, you cannot find him guilty on any of the substantive counts." (A. 347a). This argument is completely inconsistent with the belated "Galler Only" theory now advanced to this Court. Introduction of the Galler only theory, therefore could have misled the jury into a possible wrongful acquittal on the substantive counts. For an acquittal on the perjury count to necessitate an acquittal on the substantive counts, as defense counsel had argued to the jury, the critical question must be read to include the invoices billed from Lee Avenue patients and not just those of Galler patients.

366 F.2d 853, 873 (2d Cir. 1966), *cert. denied*, 386 U.S. 908 (1967).*

In addition, Napoli's failure to make a timely offer of the Grand Jury testimony prevented the Government from proving that even if the Grand Jury testimony were interpreted to apply to Galler invoices only, Napoli's answer was still perjurious. The indictment in its original form alleged overbilling with respect to Galler invoices and testimony was available to show that Galler patients had been treated fewer times than revealed in Napoli's Medicaid billings of Galler patients. Similarly, the Government was also prevented from proving that other portions of the grand jury testimony were untrue or that there was—contrary to the impression given by the grand jury testimony—a very real connection between the Galler and Lee Avenue clinics.** Since the "Galler only" theory was never mentioned to the District Court, these considerations—which surely would have only reinforced the Court's decision to prevent reopening of the case to admit the unauthenticated transcript—never could be brought out.

Finally, it should be noted that even had Judge MacMahon admitted the proof in an abundance of generosity

* The belated offer of the transcript of course prevented the Government from pointing out in summation defendant's total failure to claim any misunderstanding of the question, a point that no doubt would have been extremely persuasive to show that defendant understood the word "ever" to have its plain all-inclusive "meaning in the English language. *United States v. Bayer, supra*.

** For example at E69 of the transcript Napoli was asked: "Did you ever work at any other clinic [other than Galler] that Dr. Kavalier was associated with?" to which he answered "No..." At sentencing, counsel conceded that Kavalier who is currently serving a 4-year prison term for Medicaid Fraud, see p. 45, n.*, *infra* had a substantial association with the Lee Avenue Clinic, namely that he was in charge of the chiropractic concession at Lee Avenue where Napoli worked as a chiropractor. See also *supra*, p. 9 n.*.

no consequence would have ensued. The jury never asked to see any of the exhibits in the case and hence they never would have seen the grand jury transcript. Accordingly the verdict could not have been affected in any way and any error, assuming it existed, was harmless beyond a reasonable doubt, *Chapman v. California*, 386 U.S. 18 (1967).

In sum, Napoli's claim of error in the District Court's refusing to reopen defendant's case at the twelfth hour is frivolous.

POINT IV

The Indictment Was Valid And Any Objection To Its Validity Is Untimely.

Napoli attacks the validity of the indictment on the ground that since it was procured by the use of hearsay testimony he was deprived of the right to develop possible inconsistencies that might have arisen from patient witness testimony in the grand jury. However, the defendant failed to raise his objections to the use of hearsay in obtaining the indictment before trial as required by the Federal Rules of Criminal Procedure* or even at any time during it. The time limits of Rule 12 exist so that

* In pertinent part, F. R. Crim. P., Rule 12 provides:

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings).

* * *

[Footnote continued on following page]

"... inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial." *Davis v. United States*, 411 U.S. 233, 241 (1973).

Thus a claim falling under Rule 12 cannot be raised in the absence of the showing of cause that that Rule requires. *Id.* at 242. "Cause" requires at least a "plausible explanation of his failure to timely make his objection." *Id.* at 243. Napoli offers no reason why he or his attorney did not raise this issue at trial.* Having failed to raise his objection prior to trial, as required by F.R. Crim. P. Rule 12(b) (1) and (2), he is barred from raising the issue on appeal. *United States v. McGrath*, Dkt. No. 77-1064, slip op. 4827, 4831 (2d Cir., July 19, 1977); *United States v. Braunig*, *supra*, 553 F.2d at 780; *United States v. Marquez*, 462 F.2d 893 (2d Cir. 1972); Fed. R. Crim. P. Rule 12(f).

Napoli, all but conceding he has waived this claim for failure to comply with Fed. R. Crim. P. 12, asserts that the manner in which his indictment was procured so

(f) Effect of Failure to Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

* Napoli's brief merely states that "previous counsel for the defense did not see fit to question" the manner of indictment. (Br. at 41). In view of the total lack of prejudice to Napoli, see p. 35-36, *infra*,^{this} is not surprising.

prejudiced him as to amount to plain error. Since the indictment was proper in any event and since the claimed prejudice is non-existent, the claim of error, much less plain error, is frivolous.

In *Costello v. United States*, 350 U.S. 359 (1956), the Supreme Court held unequivocally that an indictment based entirely on hearsay is not open to challenge on the ground of competency and adequacy of the evidence. The Court refused to upset such an indictment either as a matter of constitutional law or under its supervisory powers. The Second Circuit has followed *Costello* in holding that even "an indictment based exclusively on hearsay need not be dismissed." *United States v. Covello*, 410 F.2d 536, 546 (2d Cir.), cert. denied, 396 U.S. 879 (1969). See also *United States v. Beltram*, 388 F.2d 449 (2d Cir.), cert. denied, 391 U.S. 955 (1968); *United States v. Malofsky*, 388 F.2d 288 (2d Cir.), cert. denied, 390 U.S. 1017 (1968); *United States v. Andrews*, 381 F.2d 377 (2d Cir. 1967), cert. denied, 390 U.S. 960 (1968).

This position has been consistently maintained;

"subject to only two privisos—that the prosecutor does not deceive grand jurors as to 'the shoddy merchandise they are getting so they can seek something better if they wish' (citation omitted) or that the case does not involve 'a high probability that with eyewitnesses rather than hearsay testimony the grand jury would not have indicted'." (Citations omitted) *United States v. Estepa*, 471 F.2d 1132, 1137 (2d Cir. 1972).

Cases subsequent to *Estepa* make clear that what is prohibited in this Circuit is not the use of hearsay testimony *per se*, but deceiving the grand jury into believing that it is getting first-hand testimony when, in fact, it is not. *United States v. Harrington*, 490 F.2d 487 (2d Cir. 1973); *United States v. Pamirez*, 482 F.2d 807, 812

(2d Cir.), *cert. denied*, 414 U.S. 1070 (1973). Thus in *Harrington, supra*, 490 F.2d at 489, this Court stated:

"*Estepa* was thus not intended to modify broadly the rule recognizing the acceptability of hearsay evidence in grand jury proceedings. See *Costello v. United States*, 350 U.S. 359 (1956). Rather, it was intended as manifest warning that it is impermissible to have law enforcement officers who have no first-hand knowledge of the subject the grand jury is investigating testify as if they possessed that knowledge."

Napoli makes no allegations nor offers any evidence to establish or even suggest that the grand jury has been misled in any fashion or that it would not have indicted had the patient witnesses testified in person.*

Further, it was also "demonstrably inconvenient to summons the witnesses able to testify to facts from personal knowledge," *United States v. Umans*, 368 F.2d 725, 730 (2d Cir. 1966), *cert. dismissed as improvidently granted*, 389 U.S. 80 (1967). This case was presented

*Indeed, although prevented by the absence of a motion from making a showing before the District Court, the Government can represent unequivocally that on March 3, 1977, the day the testimony concerning Napoli was heard and the indictment voted, the grand jury was explicitly informed about the nature of the evidence it received. In particular, the grand jury was told the testimony of Mrs. Morey upon which the indictment was based was hearsay, a term which was defined for the jurors. The grand jury was told that a better quality of evidence existed, namely the actual persons interviewed by Mrs. Morey. They were told that they were entitled to hear the testimony of additional witnesses if they desired. The grand jury specifically indicated it did not wish to call any additional witnesses. Moreover, the testimony of Mrs. Morey on March 3, 1977 (GX 3521) is replete with references that she was relating what others had told her and not what she herself observed. The Government will of course make the grand jury testimony available for the Court's inspection, upon request.

to the grand jury in March, 1977 as defendant concedes (Br. at 13) in the fifth year of a five-year statute of limitations, Title 18, U.S.C. § 3282. (GX 2). Thus time was of the essence. In addition, the investigator handling the case was due to be transferred and a speedy presentation to the grand jury was dictated (A. 260a).

As was explained to the trial court in another context, locating patient witnesses in a Medicaid case is a difficult task. Due to the mobility of this segment of the population, the initial investigation was able to contact only 45 out of 70 to 80 witnesses the government wished to contact (A. 31a). To have presented the witnesses the government did find would have delayed the presentation and due to the running of the statute of limitations, jeopardized some of the counts of the indictment. It should be noted that a number of witnesses at trial required translators and such arrangements would have compounded the scheduling problem. The inconvenience and expense required to bring the 20 witnesses to the grand jury for the minute or two required to simply repeat or adopt what they had previously stated to Mrs. Morey, who made notes of her interviews, is obvious.

Napoli in an effort to show prejudice to him that does not exist maintains that the use of hearsay deprived him of his right to impeach by contradiction. (Br. at 35). However, the Government is under no duty to call witnesses before the grand jury solely to create prior testimony with which the defendant may develop inconsistent stories. *United States v. Leibowitz*, 420 F.2d 39, 42 (2d Cir. 1969). When the direct testimony is unavailable or prior statements other than grand jury testimony are furnished to the defendant the government is justified in using hearsay in the grand jury. *United States v. Umans, supra*.

Napoli's claims that he did not have impeachment material prior to trial are simply not correct. Since

he knew from the indictment the names of the patient witnesses, and since their addresses during the period of time they were or still are being treated by Lee Avenue appear on the clinic's medical records (Def. Ex. K), which were made available prior to trial, he was able, as the record shows, to have his investigator interview a number of witnesses before trial. (*E.g.*, A. 95a, 102a, 158a, 198a and 212a). Indeed it appears he was able to tape record interviews without the witnesses' knowledge. (A. 95a). Additionally, defense counsel, contrary to the suggestion on appeal, was given the notes of statements made by each and every one of the government's witnesses to government officials which was turned over as 3500 material and made available for use in cross-examination. (GX 3501, 3502, 3503A-B, 3505, 3507A-B, 3508, 3510, 3512, 3513, 3514, 3515, 3516, 3518, 3519 and 3521). Several witnesses were in fact, impeached by their inconsistencies with these prior statements (*E.g.* A. 91a-93a, 157a, 226a).*

In sum, where, as here, 1) the grand jury was not in the slightest misled as to the nature of the testimony before it, (2) there was good reason to use hearsay testimony in the grand jury and (3) not the slightest prejudice occurred, it would be folly to undo the results of a fully-contested trial when the defendant made absolutely

* Moreover, defense counsel extensively cross-examined using far more fruitful avenues of impeachment such as the witnesses' inability to remember numerous details concerning their non-chiropractic medical treatment. See Point V, p. 40-41, *infra* for a complete discussion of the efficacy of trial counsel's cross examination of the patient witnesses. In view of this extensive cross-examination, which Napoli claims was effective enough to have shown the poor quality of the government's case (Br. at 10-12), the claim that requiring witnesses to reaffirm the statements made to Mrs. Morey and used for cross-examination at trial would have produced additional impeachment material that could have had the slightest bearing on the outcome of the trial, flies in the face of common sense.

no claim prior to or even during the trial concerning the propriety of the Grand Jury procedures.**

POINT V

Napoli Was Not Denied Effective Assistance Of Counsel.

Napoli argues that this Circuit's standard to measure ineffective assistance of counsel is no longer the stringent one enunciated in *United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950) and that under a more lenient "reasonable competency" standard supposedly in actual use in this Circuit defendant's trial counsel was inadequate. This claim is frivolous.

Napoli's argument ignores the unequivocal language of this Circuit in recent cases reaffirming without qualification the *Wight* standard. *Lipuma v. Commissioner, Department of Correction*, Dkt. No. 77-2006, slip op. 4657, 4668-4670 (2d Cir., July 11, 1977). As was stated by this Court in another recent case:

"The stringent standard in this Circuit for nearly three decades for determining lack of effective assistance of counsel is that enunciated in *United States v. Wight*, 176 F.2d 376, 379 (2[d] Cir. 1949) (Smith, J.), *cert. denied*, 338 U.S. 950 (1950), and recently reaffirmed in *Rickenbacker v. Warden*, 550 F.2d 62, 65-66 (2[d] Cir. 1976) (Smith, J.), and authorities cited therein, *id.* at

** It is especially futile to require a new grand jury to hear the witnesses without cross-examination to find probable cause to indict when after the time and expense of a full trial twelve jurors believed each of these witnesses beyond a reasonable doubt after each had been subjected to extensive and skilled cross-examination.

65. The *Wight-Rickenbacker* standard is as follows:

'[U]nless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice. . . . A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice. . . .'
176 F.2d at 379 (*Wight*); 550 F.2d at 65 (*Rickenbacker*).

This standard has been repeatedly reaffirmed and uniformly adhered to by our Court. See, e.g., *United States v. Taylor*, — F. 2d —, —, — (2[d] Cir. 1977), slip op. 2805, 2829, 2842-43 (April 13, 1977); *Lunz v. Henderson*, 533 F.2d 1322, 1327 (2[d] Cir. cert. denied, 429 U.S. 849 (1976)); *United States v. Yanishefsky*, 500 F.2d 1327, 1333-34 & n. 2 (2[d] Cir. 1974); *United States ex rel. Marcelin v. Mancusi*, 462 F.2d 36, 42, and authorities cited at 42 (2[d] Cir. 1972), cert. denied, 410 U.S. 917 (1973).

We continue emphatically to adhere to this standard.

United States v. Bubar, Dkt. No. 76-1140, slip op. 4519, 4536 (2d Cir., June 30, 1977); *Accord, United States v. Almestica*, 546 F.2d 524, 525 (2d Cir. 1976); *United States v. Ortega Alvarez*, 506 F.2d 455, 458 (2d Cir. 1974), cert. denied, 421 U.S. 910 (1975); *United States ex rel. Walker v. Henderson*, 492 F.2d 1311, 1312 (2d Cir.), cert. denied, 417 U.S. 972 (1974); *United States v. Sanchez*, 483 F.2d 1052 (2d Cir. 1973), cert. denied, 415 U.S. 991 (1974).

Napoli does not claim that he comes close to meeting this test, nor do his blunderbuss charges, taken singly or together, meet it.* As was shown in Points II, III and IV, *supra*, nearly every one of the ten claimed errors committed by counsel at trial (Br. at 44-47) were not errors at all. At best, these "errors" represent *post-hoc* quibbles by Napoli concerning strategy of his trial counsel. It is well settled that "tactical errors or strategic miscalculations by counsel afford no constitutional grounds for relief." *United States ex rel. Walker v. Henderson, supra*, 492 F.2d at 1312; accord *United States v. Yanishefsky, supra*, 500 F.2d at 1333; *United States ex rel. Crispin v. Mancusi, supra*, 448 F.2d 233, 235-37 (2d Cir.), *cert. denied*, 404 U.S. 967 (1971); *United States v. Matalon*, 445 U.S. 1215, 1218-19 (2d Cir.), *cert. denied*, 404 U.S. 853 (1971); *United States v. Silva*, 418 F.2d 328, 331 (2d Cir. 1969); *United States ex rel. Maselli v. Reincke* 383 F.2d 129, 133 n. 4 (2d Cir. 1967).

Indeed the record reveals that in the context of this very simple case,** experienced trial counsel, J. Jeffrey

* Indeed, as in *United States v. Daniels*, Dkt. No. 77-1071, slip op. 4579 (2d Cir., June 30 1977); *United States v. Medico*, Dkt. No. 76-1426, slip op. 3795, 3812 (2d Cir., May 25, 1977) and *Rickenbacker v. Warden, supra*, this Court would not even have to reach the issue of whether to apply a more lenient standard than the "mockery of justice" standard of *Wight*, were that issue not so clearly settled in his Circuit, since Napoli would fail to meet even the lax standard of absence of "reasonable competency" suggested by him.

** As this Court has noted, "the quality of legal representation cannot be abstractly measured without reference to the merits of a defendant's case." *United States ex rel. Testamark v. Vincent*, 496 F.2d 641, 643 (2d Cir. 1974), *cert. denied*, 421 U.S. 951 (1975). As the Court has further noted, in language singularly appropriate to this case,

"Determination of the effectiveness of counsel cannot be divorced from the factual situation with which he is confronted. When, as here, the prosecution has an over-

[Footnote continued on following page]

Weisenfeld, did all that could possibly be expected of him. He made a comprehensive pretrial motion raising such issues as pre-indictment delay, the composition of the grand jury, and the failure of the indictment to state a crime. (A. 9a-16a). Counsel made an eminently thorough discovery request (A. 17a-19a) which was diligently pursued by motion and at a pretrial conference requested by him to receive additional discovery material. (A. 10a, 15a-16a, 22a-42a). In addition to receiving some of the materials requested he obtained the patient records at the Lee Avenue clinic of virtually every patient witness (Def. Ex. K), of which he made ample use on cross-examination. In addition to this, trial counsel had his investigator interview Government witnesses (A. 95a, 102a, 158a, 212a, and was apparently armed with taped interviews of them. (A. 95a).

Trial counsel recognized, and it is not disputed on this appeal, that the credibility of the witnesses was the crucial issue at trial. He wisely concentrated on this area with outstanding skill. Despite the fact that he was faced with an overpowering case of fifteen apparently disinterested witnesses who stated consistently and without hesitation that they had been billed for fewer times than Napoli claimed, counsel was able to develop a number

whelming case based on documents and the testimony of disinterested witnesses, there is not too much the best defense attorney can do. If he simply puts the prosecution to its proof and argues its burden to convince the jury beyond a reasonable doubt, the defendant may think him lacking in aggressiveness, and surely will if conviction occurs. If he decides to flail around and raise a considerable amount of dust, with the inevitable risk that some may settle on his client, the defendant will blame him if the tactic fails, although in the rare event of success the client will rank him with leaders of the bar who have used such methods in some celebrated trials of the past." *United States v. Katz*, 425 F.2d 928, 930 (2d Cir. 1970) (Friendly, J.).

of weaknesses in the testimony of the Government witnesses. He was able to elicit that on numerous occasions Medicaid patients traded or lost their Medicaid cards thereby permitting him to argue that other patients might have been treated using the Medicaid cards of the witnesses which lacked identifying pictures. (E.g., A. 110a, 138a, 254a-256a). He demonstrated that witnesses could not remember events occurring one week before (A. 95a) or that they had told defense investigators that they could not be expected to remember events that happened five years before. (A. 102a). With nearly every witness, he was able to show weaknesses in their ability to recount with any detail the medical histories of themselves or their children, aside from their chiropractic treatment at the clinic. (A. 93a-95a, 103a, 110a-18a, 126a-30a, 148a-50a, 152a, 158a-59a, 170a-72a, 181a-82a, 186a-92a, 198a-201a, 208a-12a, 219a-21a, 227a-31a, Def. Ex. A, D, E, F, H, I) With some of the witnesses he was even able to show weakness in their memory of their visits to chiropractors (E.g., A. 179a). For example, he demonstrated that one witness claimed to have gone to Lee Avenue clinic only thirty times when medical records revealed she had gone over 80 times. (A. 199a) (Def. Ex. K). He showed that another witness could not remember the name of the last doctor she saw (A. 103a). He cross-examined witnesses in an able attempt to demonstrate that they may have been intimidated by a Government investigation and have tailored their testimony accordingly. He ably attempted to show that another witness who admitted committing Medicaid fraud was not being prosecuted by the Government (A. 109a-110a). He also developed inconsistencies of the witnesses with their prior statements to the Government (E.g. A. 91a-92a). The Court need only read the cross and recross examination of the Government's first witness to see the effectiveness of trial counsel's examination of witnesses (A. 89a-97a, 102a-103a). Indeed it is odd that counsel on appeal, despite the overwhelming *prima facie* case against Napoli, thought enough of the weaknesses developed by trial

counsel to argue to this Court that the quality of the evidence was not sufficient to support a conviction (Br. at 10-12, 56). In addition defense counsel repeatedly managed to keep out damaging evidence against his client (See p. 4, n.*, *supra*, A. 261).

The summation, despite trial counsel's lack of daily copy *, was a coherent, articulate and artful presentation of the defendant's case. It argued the issues of the witness' inability to remember, their motives for testifying favorably to the Government and the possible misuse of Medicaid cards which would have resulted in others visiting Dr. Napoli for the number of times billed on invoices. It argued very forcefully why Napoli should be believed and that his actions of voluntarily testifying in the grand jury and submitting certain records to the Government was consistent with what an innocent man would do (A. 332a-348a). Rather than avoid the testimony concerning defendant's tax return, trial counsel argued defendant's version of what occurred, made clear that the issue of defendant's tax return was not on trial and argued the Government's own lack of belief in the falsity of the tax return by pointing out its failure to bring even a civil proceeding to recover taxes against Dr. Napoli (A. 342a-43a). This approach is now criticized on appeal, but in a case centering on defendant's credibility it was a rational, if not preferable course. *United States v. Daniels, supra*, slip op. at 4588. Defense counsel supported defendant's credibility with the character testimony of seven witnesses, again showing his careful preparation (A. 286-306). The character testimony was skillfully used in summation (A. 343a-34a, 346a). Indeed defendant's summation, now complained of as somehow inadequate prompted the Government to comment in rebuttal sum-

* The Government, too, summed up without benefit of daily copy.

mation on trial counsel's eloquence and to state that he was "an excellent lawyer" (A. 349a).

As the record here so amply demonstrates the quality of trial counsel's work, there is no need to remand for a hearing on competency of counsel. As this Court has noted, "[i]f [defendant] were to be afforded a hearing on the allegations presented here, our trial and appellate dockets would be swollen with incompetence of counsel cases. A convicted defendant is a dissatisfied client, and the very fact of his conviction will seem to him proof positive of his counsel's incompetence." *United States v. Garguilo*, 324 F. 2d 795, 797 (2d Cir. 1963).

This last sentence, which this Court has recently had occasion to reaffirm, *United States v. Joyce*, 542 F. 2d 158, 160 (2d Cir. 1976), provides an apt explanation for the raft of unwarranted and exaggerated claims of error and prejudice on this appeal.

POINT VI

Judge MacMahon Properly Sentenced Napoli.

Napoli contends that his sentence was imposed: "(1) without the informed and sound discretion of the trial judge after consideration of all the circumstances of the crime, and (2) without consideration of the judicially approved policy of individualizing sentences." (Br. at 50). This claim is based only on the allegation that Judge MacMahon showed bias towards a group of offenders, namely doctors participating in the Medicaid program, when he stated that to let the defendant go unpunished would be "to announce to the whole medical profession that Medicaid is some kind of grab bag for greedy doctors." (A. 396a-397a). This claim is frivolous.

Napoli was convicted of fifteen counts of making false statements to the Department of Health, Education

and Welfare and one count of perjury, on each of which counts he could have received consecutive sentences of 5 years in prison and a \$10,000 fine. Title 18 U.S.C. §§ 1001, 1623. His sentence, of 2 years in prison, 2 years probation and \$20,000 fine, is a fraction of the statutory maximum. The sentence being well within statutory limits and there being no claim that the sentence was based on a factual misunderstanding or misinformation concerning the defendant, *United States v. Robin*, 545 F.2d 775 (2d Cir. 1976); *United States v. Stein*, 544 F.2d 96 (2d Cir. 1976); *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970, and no showing it was based on constitutionally impermissible factors *United States v. Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973), Napoli's sentence is not reviewable. *United States v. Mejias*, 552 F.2d 435, 442-43 (2d Cir. 1977); *United States v. Seijo*, 537 F.2d 694, 700 (2d Cir. 1976); *United States v. Velazquez*, 482 F.2d 139, 142 (2d Cir. 1973) (and cases cited therein). Accord *Dorszynski v. United States*, 418 U.S. 424, 440-41 (1974); *Gore v. United States*, 357 U.S. 386, 393 (1958); *United States v. Tucker*, 404 U.S. 443, 447 (1972); *United States v. Tramunti*, 513 F.2d 1087, 1120 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States v. Hendrix*, 505 F.2d 1233 (2d Cir. 1974), *cert. denied*, 423 U.S. 987 (1975).

In addition, there was simply nothing improper in the manner in which Judge MacMahon arrived at his sentence. Judge MacMahon, having presided at trial and having read the probation report, took into account personal factors both positive * and negative ** relating to

* "I feel sorry for your family, very sorry for them. . . . Your children are at an age where they need a father. I'm mindful of that too." (A. 397a). Judge MacMahon also heard the extensive character testimony at trial. (A. 286a-306a).

** "You weren't hungry. You were greedy. I find no mitigating circumstances at all for an educated man, a man who has had all the privileges that this country could give him, an opportunity to rise above his station in life, climb the

[Footnote continued on following page]

Napoli, the repeated and deliberate nature of Napoli's criminal activities and the fact that Napoli aggravated his crime by committing perjury both in the grand jury and at trial* (A. 396a). Judge MacMahon went on to consider the effect that this sentence would have on others who defrauded Medicaid. His statement that "It is time you were made to realize and your colleagues were made to realize that this is a serious crime;" (A. 397a) is nothing more than indicating that Napoli's sentence was based in part on the need to discipline Napoli as a wrongdoer and part on the need to deter others from committing like offenses. Such general deterrence is, of court, a valid factor to consider in arriving at a proper sentence, *Williams v. New York*, 337 U.S. 241, 248 n.13 (1949). *Accord Fielding v. LeFevre*, 548 F. 2d 1102, 1108 (2d Cir. 1977); *United States v. Foss*, 501 F. 2d 522, 527 (1st Cir. 1974); See *Pell v. Procunier*, 417 U.S. 817 (1974); M. Frankel, *Criminal Sentences: Law Without Order* 106 (1972). The need for general deterrence is especially important in cases involving Medicaid fraud where the Government is cheated not by an isolated act easily proved but by a continued practice of bilking

ladder of success, and then he has got to cheat and steal and defraud the very Government that makes it possible. You are not some poor man addicted to narcotics who can't control what he is doing. This was a free choice on your part and was deliberate, deliberate—repeated." (A. 396a).

* The fact that Napoli was convicted for perjury distinguishes *United States v. Jacobson*, 77 Cr. 168 (ELP) (S.D.N.Y.) cited by appellant (Br. at 54) even were it proper to balance the sentences of one defendant against another, which it is not. See *United States v. Mitchell*, 392 F.2d 214, 217 (2d Cir. 1968). In addition, Napoli conveniently ignores longer sentences meted out in the Southern District of New York to perpetrators proven to have committed small dollar amounts of Medicaid fraud. For example see the four-year sentence in *United States v. Buthorn*, S76 Cr. 600 (CLB), appeal pending Dkt. No. 77-1205, where Buthorn, unlike Napoli, was not even convicted of perjury.

small amounts of money over many instances *. There is not the slightest indication that Judge MacMahon in sentencing Napoli was applying a predetermined fixed or mechanical sentencing policy applicable to all defendants convicted of Medicaid fraud. See *United States v. Baker*, 487 F. 2d 360 (2d Cir. 1973), where statements far more indicative of a mechanical sentencing policy were not sufficient to require review of the trial court's sentence.

CONCLUSION

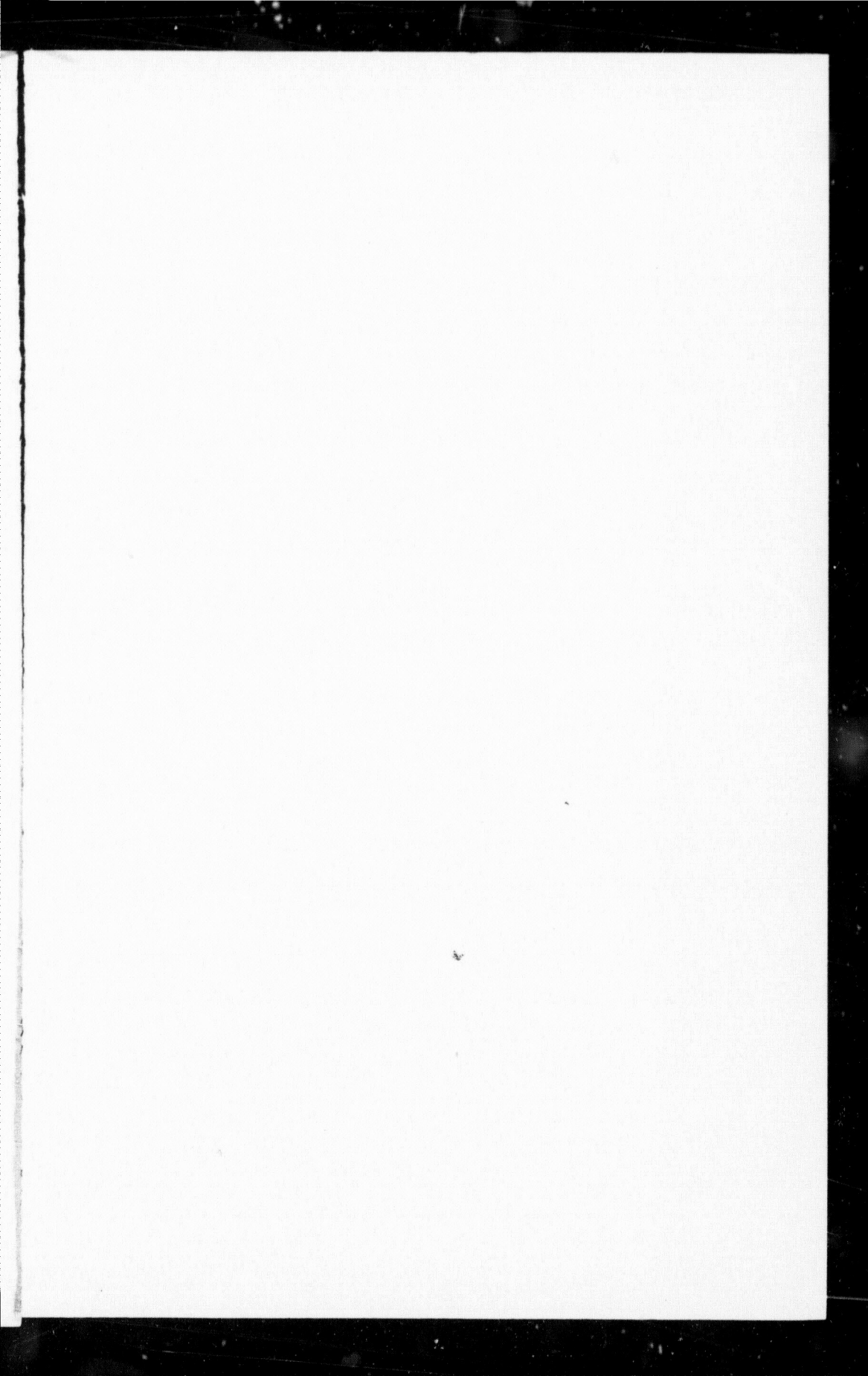
The judgment of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

PETER M. BLOCH,
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Of Counsel.*

* In the instant case, it required the time and expense of 15 witnesses and one investigator to ferret out the fraud perpetrated in only a small sample of Napoli's practice.



AFFIDAVIT OF MAILING

State of New York)
County of New York)

PETER M. BLOCH, being duly sworn
deposes and says that he (~~she~~) is employed in the office of the
United States Attorney for the Southern District of New York.

Stating also that on the 18th day of August, 1977
he (~~she~~) served a copy of the within brief (2 copies)
by placing the same in a properly postpaid franked envelope
addressed:

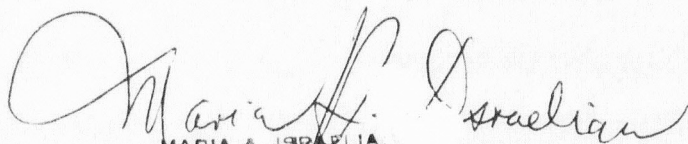
Robert J. Aurigema, Esq.
Doran, Colleran, O'Hara, Pollio & Dunne, P.C.
1461 Franklin Avenue
Garden City, New York 11530

And deponent further says that he (~~she~~) sealed the said envelope
and placed the same in the mailbox for mailing at the United
States Attorney's Office, Southern District of New York, One
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Peter M. Bloch

Sworn to me before this

18th day of August, 1977.

Maria A. Israelian

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 314521851
Qualified in New York County
Term expires March 30, 1978

